Supreme Court, U.S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

No. 80-434

In the Supreme Court of the United States

OCTOBER TERM, 1980

SMITHKLINE CORPORATION, PETITIONER

v.

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, AND UNITED STATES OF AMERICA

ON CONDITIONAL PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Comptroller General's request for access to petitioner's records pursuant to 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) was invalid because of the purpose underlying the request.

2. Whether, with respect to a negotiated government contract in which a fixed price was set on the basis of the commercial market price and without reference to incurred costs, the Comptroller General is authorized by 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) to examine the contractor's records of its costs, including its unallocated costs, where government payments under the contract are used to defray those costs.

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OPINION BELOW

The opinion of the district court (Pet. App. 1a-21a) is reported at 483 F. Supp. 712.

JURISDICTION

The judgment of the district court, dated January 24, 1980 (Pet. App. 1a), was entered on January 25, 1980 (C.A. App. 4).[1] On March 19, 1980 (C.A. App. 5), petitioner filed a notice of appeal (Pet. App. 1b) to the United States Court of Appeals for the Third Circuit, and the case is still pending in that court (No. 80-1464). The conditional petition for a writ of certiorari before judgment was filed on September 18, 1980. The jurisdiction of this Court to review the case by writ of certiorari before final judgment of the court of appeals is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

STATEMENT

1. In 1973 and 1974, petitioner entered into three contracts with the Defense Supply Agency of the Department of Defense and two contracts with the Veterans Administration for the sale of pharmaceutical products to the government. Each of the five contracts was a negotiated fixed-price contract in which the price was based on petitioner's published catalogue price for the particular product; the total price for the contracts was approximately $3.3 million (Pet. App. 2a, 15a n.7; C.A. App. 47-51). As required by 10 U.S.C. 2313(b)[2] and 41 U.S.C. 254(c),[3] each of the contracts contained a standard

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[1] "C.A. App." refers to the joint appendix filed by the parties in the court of appeals.

[2] This provision is applicable to the Defense Supply Agency contracts.

[3] This provision is applicable to the Veterans Administration contracts.

access-to-records clause in which petitioner agreed that the "Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract * * * , have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract" (Pet. App. 3a-4a; C.A. App. 48-53).

In May 1972, the General Accounting Office began "a two-phase study of the economics and operations of the pharmaceutical industry" (Pet. App. 7a). In the first phase of the study, petitioner and five other pharmaceutical firms agreed to permit GAO officials to visit and inspect their facilities and operations. The companies declined, however, to participate in the second phase of the study, which was designed to enable GAO to examine "the salient economic and operational aspects of the drug industry" (*ibid.*). Because of the companies' failure to cooperate, GAO abandoned its plans for the second phase of the study and proposed "a more modest study" based on data to be obtained under the foregoing access-to-records provisions (*id.* at 8a).

In August 1974, the Comptroller General wrote to the six companies, including petitioner, to request access to designated records pursuant to the access-to-records provisions. The Comptroller General explained that the request was part of "a review of the procurement of drugs by agencies of the Federal Government, including the pricing of drugs and pharmaceuticals procured under negotiated contracts" (Pet. App. 8a-9a). To that end, the Comptroller General sought to examine

> all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs

> including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests.

Pet. App. 9a; C.A. App. 61.

2. Petitioner refused to comply with the Comptroller General's request. Instead, on February 20, 1975, it commenced the present action in the United States District Court for the Eastern District of Pennsylvania seeking declaratory and injunctive relief to bar GAO from access to its records. The United States subsequently intervened as a defendant and filed a counterclaim to require petitioner to allow the requested inspection (Pet. App. 1a-2a, 9a).

Following discovery, the district court on January 24, 1980, granted the government's motion for summary judgment and denied petitioner's cross-motion (Pet. App. 1a-21a). Contrary to petitioner's contention that the Comptroller General's request had been prompted by the assertedly improper purpose of "seeking information concerning profits in the pharmaceutical industry for dissemination to Congress and the public" (*id.* at 10a), the court found, "[o]n the basis of uncontroverted depositions and affidavits filed by the parties in connection with the motions for summary judgment" (*id.* at 2a), "that GAO's purpose is to compare cost to price of drugs purchased under specified contracts to determine the adequacy of the protections afforded the government in the contract negotiation process" (*id.* at 12a). Relying on the legislative history of the access-to-records statutes and the decision in *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013

(9th Cir. 1967), cert. denied, 390 U.S. 988 (1968), the court also concluded that the statutes were intended to enable GAO "to determine whether * * * there have been 'improprieties and wastefulness in the negotiation of contracts,' or whether * * * the contractor's costs are 'out of line with the contract price' " (Pet. App. 15a-16a). Accordingly, the court held that the Comptroller General's purpose "to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests" (*id.* at 16a) was "a purpose authorized by the statutes" (*id.* at 17a).

In addition, in view of the plain meaning of the statutes and the *Hewlett-Packard* decision, the court rejected petitioner's argument that the access-to-records provisions were entirely inapplicable to negotiated fixed-price contracts in which, as here, the price was based on the contractor's catalogue price (Pet. App. 15a n.7).

Finally, in accordance with *Hewlett-Packard* and *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904 (7th Cir.), cert. denied, 439 U.S. 959 (1978), the court held that, at least with respect to the pharmaceutical industry, the access provisions are not limited to records of "the direct costs of manufacturing the drug covered by the contract" but include "the records of all costs which go into the makeup of the price of the drug covered in the contract" (Pet. App. 18a). The court recognized that the direct-cost "limitation, in the drug industry, would defeat the purpose of the access-to-records statutes since, as the [c]ourt in *Eli Lilly* pointed out, manufacturing and distribution costs of drugs have been estimated to constitute as little as nine percent of the product's sale price" (*ibid.*). Construing the statutes "in light of their purpose to permit a determination as to whether costs are 'out of line with the contract price' " (Pet. App. 18a, quoting *Hewlett-Packard Co.* v. *United States*, *supra*, 385

F. 2d at 1016), the court "agree[d] with Eli Lilly's reasoning that 'the access-to-records clauses should be interpreted so that an item is "directly pertinent" to a contract if it is a significant input in the price of the product purchased in the contract' " (Pet. App. 18a).

Pursuant to its opinion, the district court entered summary judgment for the government and ordered

> that the Comptroller General of the United States and his duly authorized representatives have the right to examine all books, documents, papers, or records directly relating to the pricing and cost of producing items furnished by [petitioner] under the following contracts * * *, including, but not limited to, records of experienced costs, including costs of materials, labor, overhead, distribution, research and development, and marketing, and such other costs as are directly pertinent to the drugs covered in the enumerated contracts * * *.

Pet. App. 19a. The court's order also included "provisions concerning the confidentiality of records, as agreed by the parties" (*ibid.*).

On March 19, 1980, petitioner appealed the district court's judgment to the United States Court of Appeals for the Third Circuit. That appeal is still pending; all briefs have been submitted, but oral argument has been deferred by the court of appeals until after the disposition of this petition (see order of Oct. 22, 1980).

ARGUMENT

Petitioner initially urges (Pet. 9-10, 18) that the Court deny the government's petition for a writ of certiorari in *Staats* v. *Bristol Laboratories*, No. 80-264 (filed Aug. 21, 1980), which presents a related issue concerning GAO's access to cost records of pharmaceutical companies

pursuant to the access-to-records provisions required by law. However, petitioner does not contest that there is currently a conflict in the circuits on the construction of the access statutes[4] or that a uniform interpretation of those statutes is sufficiently important to the proper administration of the federal procurement system to warrant this Court's review (see 80-264 Pet. 8-9). For the reasons stated below (see page 18, *infra*) and in the government's petition and reply memorandum in *Bristol*, we submit that the Court should decide the issue at this time and not postpone the resolution of the existing conflict.

In the alternative, petitioner contends that if the Court grants the petition in *Bristol*, it should also grant the instant conditional petition for a writ of certiorari before judgment to consider two issues that are not involved in *Bristol* and do not present a conflict in the circuits. Petitioner argues, first, that the Comptroller General's request for access was invalid because it was motivated by an improper purpose, and, second, that the access-to-records provisions are simply inapplicable and afford no access whatever in circumstances in which, as here, neither the negotiation nor the performance of the contract related to the contractor's costs.[5] As we discuss below,

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[4]Petitioner acknowledged in the court of appeals (SmithKline Br. 45) that there is a "square[] * * * conflict among the Circuits" in light of *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904 (7th Cir.), cert. denied, 439 U.S. 959 (1978), *United States* v. *Abbott Laboratories*, 597 F. 2d 672 (7th Cir. 1979), and *Bristol Laboratories* v. *Staats*, 620 F. 2d 17 (2d Cir. 1980), petition for cert. pending, No. 80-264 (filed Aug. 21, 1980). See also Pet. 10 n.19; Pet. App. 12a; Conditional Petition for Certiorari Before Judgment in *Merck & Co.* v. *Staats*, No. 80-416 (filed Sept. 16, 1980), at 9, 10.

[5]Petitioner further argues (Pet. 9, 15) that the access-to-records provisions do not encompass records of its unallocated costs notwithstanding the fact that payments by the government pursuant

however, these arguments are without merit and have been rejected by every court of appeals that has considered them. The petition thus offers no reason to expand the carefully drawn issue presented in *Bristol* to include questions that have not divided the circuits and are not otherwise deserving of this Court's review, and it falls far short of the requisite showing for certiorari before judgment "that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 18. Accordingly, the conditional petition for a writ of certiorari before judgment should be denied.

1. Petitioner asserts (Pet. 7) that the access-to-records provisions authorize the Comptroller General to inspect a contractor's records "only for narrow and specific purposes. Access was permitted to audit cost data submitted in connection with specific negotiated contracts, in order to detect fraud or overreaching * * *." Notwithstanding petitioner's assertion, however, the access provisions are not confined to discrete audits of individual contracts in order to detect fraud and overreaching.[6]

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to the contract are used to defray those costs and, as petitioner acknowledged in the court of appeals (SmithKline Br. 42-43), "unassigned costs have an impact on the price charged for the company's products, in the sense that the company's overall income must recover both the costs directly assigned and the pooled costs which have not been assigned." This is the precise question presented by the government's petition in *Bristol*. As we explain in the petition and reply memorandum in that case, petitioner's argument represents an erroneous construction of the access provisions and should be rejected by this Court. In any event, to the extent that petitioner wishes to be heard on this issue, it should seek to participate as an *amicus curiae* in *Bristol* rather than pursue the instant petition for certiorari before judgment.

[6]Unlike petitioner, Bristol has "agree[d] that it is obliged by the terms of the contracts to provide access to [certain] records" (80-264

By their terms, the access-to-records provisions contain no limitation of the sort advanced by petitioner. Rather, they apply to all government contracts negotiated pursuant to designated statutory authority. Nothing in the language of the provisions narrows their scope to unrelated audits of specific contracts or restricts their objectives to the elimination of fraud and overreaching.

The legislative history of the access-to-records statutes also refutes petitioner's interpretation. This history has been canvassed in the government's petition in *Bristol* (80-264 Pet. 10-11) and need not be repeated here. We emphasize, however, Congress's concern that "negotiated contracts * * * require close supervision and control * * * ." H.R. Rep. No. 791, 82d Cong., 1st Sess. 2 (1951); S. Rep. No. 603, 82d Cong., 1st Sess. 2 (1951). Among other things, Congress feared that "aside from any intentional liberality on the part of the Government contracting officer, there is every chance in the world that the Government will come out on the short end of the deal." 97 Cong. Rec. 13198 (1951) (remarks of Rep. Hardy). See also *id.* at 13377 (remarks of Rep. Hoffman and Rep. Hardy). The debates contain repeated references to the need to determine whether prices in negotiated contracts were excessive, extravagant, or wasteful, and Congress "clearly understood * * * that there are a lot of other situations besides those involving fraud which might be uncovered" (*id.* at 13199 (remarks of Rep. Hardy)). For instance, as one type of "information which would be vital in a study of a contract" (*id.* at 13376), Representative Hardy offered the following illustration:

Pet. App. 8a) even though, as in the instant case, GAO had not requested the records in connection with a formal audit and had no specific grounds to believe that fraud or overreaching had occurred with respect to the contracts.

> Another vivid example of how this authority would enable the GAO to do an effective job involves a study which my Subcommittee on Government Operations has been making on pricing practices in the procurement of automotive parts. We found one situation where the Government was buying parts from an automobile dealer who, in turn, was getting them from a parts distributor who, in turn, was getting them from a small tool shop. Naturally, the price paid by the Government included profits upon profits and completely wasteful administrative and handling costs. It would be difficult, if not impossible, for GAO to detect such a situation without the right afforded in this bill.

Id. at 13198. All of these statements of congressional intent plainly extend beyond the audit of particular contracts to uncover fraud and belie petitioner's constricted construction of the access-to-records statutes.[7]

Contrary to petitioner's argument, those courts of appeals to consider the question have held that the access-

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[7]We also note the Comptroller General's statement to Congress that "any abuses discovered by the General Accounting Office in exercising the authority contained [in the bill] promptly will be brought to the attention of the proper officials, and, if warranted, to the attention of the Congress." H.R. Rep. No. 791, *supra*, at 5; S. Rep. No. 603, *supra*, at 4. As GAO subsequently explained:

> The fact that, in final analysis, we may not be able to question the legality of particular contract transactions does not preclude our reporting to the Congress and to the responsible administrative agencies that such transactions are wasteful or extravagant or that a particular contract transaction illustrates the need for an improvement in existing procurement or management procedures.

Hearings on Comptroller General Reports to Congress on Audits of Defense Contracts Before the Subcomm. on Military Operations of the House Comm. on Government Operations, 89th Cong., 1st Sess. 48 (1965) (statement of Comptroller General Campbell).

to-records provisions authorize the Comptroller General to examine a contractor's records in order to assess the reasonableness of the price charged the government and the adequacy of the protections afforded the government in negotiated procurements. See *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904, 914-915 (7th Cir.), cert. denied, 439 U.S. 959 (1978); *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013, 1016 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968); see also *Merck & Co.* v. *Staats*, Civil Action No. 74-1447 (D.D.C. Aug. 12, 1977), slip op. 3-4 (80-416 Pet. App. 3c-4c), appeals pending, Nos. 79-1435, 79-1438 (D.C. Cir., argued Feb. 11, 1980), conditional petition for cert. before judgment pending, No. 80-416 (filed Sept. 16, 1980). In *Eli Lilly*, the court expressly rejected the argument that the access-to-records provisions "were designed only to uncover 'improprieties in the negotiation of Government contracts,' " concluding instead "that controlling fraud was not the only purpose of the legislation and that another concern of the legislators was with excessive pricing" (574 F. 2d at 914). Similarly, the court in *Hewlett-Packard* also held that the access provisions were not limited either to audits of individual contracts or to suspected fraud (385 F. 2d at 1016):

> Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs. * * *
>
> Hewlett-Packard contends, in effect, that the sole purpose of the examination right accorded by section 2313(b) and clause 10 of these contracts, is to enable the Comptroller General to find out whether the

> particular contracts which give rise to the examination had been performed in accordance with their terms and whether the contracting officer had been defrauded or misled in entering into the contract.
>
> We find nothing in the words of the statute, its legislative history, or administrative interpretation, or in the impact of other statutes, which supports this view. On the contrary, it seems to us that if such a limited scope of examination had been intended by Congress it would have found the means to so indicate. The term "contract" could have been given a restricted meaning, or the scope of the permissible examination could have been specifically limited to lines of inquiry relevant to the legality and faithful performance of the particular contract giving rise to the examination.

In the present case, the district court determined, after "resolv[ing] in favor of [petitioner] any doubt concerning whether there is a genuine issue of material fact" (Pet. App. 11a), that "[t]he uncontroverted factual record * * * establishes that GAO's purpose is to compare cost to price of drugs purchased under specified contracts to determine the adequacy of the protections afforded the government in the contract negotiation process" (*id.* at 12a; see also *id.* at 16a-17a).[8] In light of the

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[8] The district court's determination in this regard was clearly correct and amply supported by the "uncontroverted depositions and affidavits filed by the parties in connection with the motions for summary judgment" (Pet. App. 2a). See, *e.g.*, C.A. App. 58, 60-61a, 116, 123, 124-125, 202-203, 211, 231-233, 408. In addition, every court to consider the purpose underlying the Comptroller General's requests to the pharmaceutical companies has agreed that, at the least, it consisted in part of the intention "to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interest" (Pet. App. 16a). See *United States* v. *Abbott Laboratories*, 597 F. 2d 672, 674 (7th Cir. 1979); *Eli Lilly & Co.* v. *Staats*, *supra*, 574 F. 2d at 910; *Merck & Co.* v. *Staats*, *supra*, slip op. 4 (80-416 Pet. App. 4c).

foregoing authorities, the court's conclusion that this was "a purpose authorized by the statutes" (*id.* at 17a) is manifestly correct.[9] And, since the Comptroller General's request was predicated on a proper purpose, it is immaterial whether, as petitioner alleges, he was motivated by any additional purposes that, *arguendo*, would not be sufficient by themselves to sustain the validity of the request. See, *e.g.*, *United States* v. *LaSalle National Bank*, 437 U.S. 298, 313-317 (1978); *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U.S. 274, 285-287 (1977).[10]

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[9]Because the district court here correctly decided that "GAO seeks [petitioner's] records for the cost-price comparison authorized by the statutes" (Pet. App. 16a), it is unnecessary in this case "to determine, as did the Seventh Circuit in *Eli Lilly*, *supra*, that an industry-wide public information study is an authorized purpose for a GAO inquiry" (*id.* at 17a).

[10]We also doubt that petitioner should be heard to question these alleged additional purposes for GAO's request. Petitioner "concedes that it voluntarily executed the contracts at issue in this case with full knowledge of the access-to-records provisions contained in each contract" (Pet. App. 10a), and the Comptroller General has now invoked those provisions to seek access to records for a purpose authorized by Congress. No rule of law excuses a party from performing a contract because it does not approve of the other party's purpose in demanding performance, and petitioner should not be allowed to inquire further into the Comptroller General's motives.

Moreover, we disagree with petitioner's repeated characterization that these alleged additional purposes were "improper." Even if petitioner were correct in arguing that the access-to-records provisions do not authorize a GAO research study, it would not follow that access to the records should be barred. Petitioner confuses an "improper" motive with a motive that is perfectly legitimate but not a sufficient ground, standing alone, for access. There has been no suggestion that a research study is forbidden by law or "improper" in any similar way. The most that petitioner can say is that the Comptroller General could not compel private parties to cooperate in such a project. But no principle of law forbids the Comptroller General from using, for purposes of a research study, information lawfully obtained pursuant to some other power.

For these reasons, the decisions cited by petitioner for the proposition that "powers granted to the Government for one

2. Petitioner further contends that, under the access-to-records provisions, "GAO should be afforded access only to data that are the subject of negotiations or are relied upon by the government agencies responsible for awarding the contracts" (Pet. 7) and that no "cost records can be 'directly pertinent' to contracts which are not cost-based" (*id.* at 14).[11] This construction of the access provisions is untenable and has been consistently rejected.

Petitioner has pointed to nothing in the language of the statutes or their legislative history that would justify such a grudging interpretation of the access provisions. On the contrary, petitioner's construction would defeat the congressional objective to guard against waste, extravagance, and excessive pricing (see pages 8-9, *supra*). Petitioner's costs, even if neither directly the basis for the contract price nor the subject of discussions prior to execution of the contract, are nevertheless critical to an assessment of the advisability of continued adherence by the government to the negotiated procurement methods employed here. If petitioner's total costs are substantially lower than the prices paid by the government, the Comptroller General may recommend that the Department of Defense and the Veterans Administration adopt different procurement practices in the future. See *Hewlett-Packard Co.* v. *United States*, *supra*, 385 F. 2d at 1016 ("[w]hile this appraisal could not affect these particular contracts, it could lead to use of other methods of meeting

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purpose * * * [may not be] utilized for other purposes" (Pet. 13) are inapposite. In each of those cases, the government's request rested on a purpose that the court held was not authorized by the governing statute. None of the cases involved access requested pursuant to contract for a purpose sanctioned by law, and none held that an otherwise legitimate request was rendered invalid and unenforcible because of the asserted existence of mixed purposes.

[11]Once again, in contrast to petitioner's position, Bristol conceded that it was required by the access provisions to furnish certain cost records in these circumstances (see note 6, *supra*).

future procurement needs"). And, as the court explained in *Eli Lilly & Co.* v. *Staats*, *supra*, 574 F. 2d at 915, the "argument that Congress could not have intended to inquire into wastefulness in contracts such as the one here in which the drugs were supplied to the Government 'at a fixed price at or below the wholesale market price' * * * ignores the fact that the information sought by the Government may show that the prices it paid were nevertheless much too high."[12]

Furthermore, petitioner's construction is at odds with the administrative interpretation adopted by GAO, which is entitled to judicial deference and which Congress, although aware of the agency's position, has never disapproved. See 80-264 Pet. 16-17. This issue appears to have first been contested by Hewlett-Packard in resisting GAO access to its cost records. See *Hearings on Relation of Cost Data to Military Procurement Before the Subcomm. for Special Investigations of the House Comm. on Armed Services*, 88th Cong., 1st Sess. 15-23

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[12] This consideration is well illustrated by the testimony of GAO General Counsel Robert Keller before a congressional subcommittee:

> The catalog prices on Government orders [under sole source procurement for klystron tubes] frequently exceeded the company's current cost of production by more than 100 percent. * * *
>
> * * * * *
>
> [T]he prices accepted by the General Services Administration and paid by the military services were substantially higher than seem reasonable in relation to the contractors' costs to manufacture and sell aircraft tires, and the Government experienced unnecessary costs in its procurement of these items * * * of approximately $10.7 million [in 1960] * * *.

Hearings on Relation of Cost Data to Military Procurement Before the Subcomm. for Special Investigations of the House Comm. on Armed Services, 88th Cong., 1st Sess. 7 (1963). See also pages 15-16, *infra*.

(1963). At that time, and prior to the commencement of litigation, GAO concluded that it was entitled to examine cost records regardless of the scope of the original contract negotiations and that such records were "directly pertinent" even though the costs of performance played no part in those negotiations. *Id.* at 21-22.

GAO's interpretation has been presented to Congress on several occasions and fully explained in terms of the legislative history and purpose of the statutes and their construction by the courts. See, *e.g.*, *Hearings on Relation of Cost Data to Military Procurement Before the Subcomm. for Special Investigations of the House Comm. on Armed Services*, 88th Cong., 1st Sess. (1963), at 8 ("Our experience indicates the need for careful examination into the reasonableness of accepting catalog or other established prices for negotiated procurements * * *. The fact that a product is listed in a manufacturer's catalog and offered to any customer is no assurance that competition actually is present or that the standard catalog price is reasonable"), 10-12 (discussing *Hewlett-Packard* case), 24-25 (relation between negotiation process and right of access); *Hearings on Comptroller General Reports to Congress on Audits of Defense Contracts Before the Subcomm. on Military Operations of the House Comm. on Government Operations*, 89th Cong., 1st Sess. (1965), at 45-46 (discussing *Hewlett-Packard* case), 512 (statement on behalf of Machinery & Allied Products Institute discussing GAO's position); 115 Cong. Rec. 25801 (1969) (GAO memorandum setting forth the agency's position, accepted in *Hewlett-Packard*, that access "is not limited to that necessary to determine whether the contracts were performed in accordance with their terms and whether the contracting officer had been defrauded or misled in entering into the contracts * * *, by what the parties may have considered

or not considered in the course of negotiations * * *, [or] by the fact that the contract was performed by the delivery of 'off-the-shelf' items not specially manufactured for the contract").

Finally, with the isolated exception of the now-reversed decision of the district court in *Eli Lilly* (see 574 F. 2d at 920, 923, 925), petitioner's position has been rejected by every court to address the issue. See *Eli Lilly & Co.* v. *Staats*, *supra*, 574 F. 2d at 914; *Hewlett-Packard Co.* v. *United States*, *supra*, 385 F. 2d at 1014, 1016; *Merck & Co.* v. *Staats*, *supra*, slip op. 2, 4 (80-416 Pet. App. 2c, 4c). See also Pet. 14 n.26; Conditional Petition for Certiorari Before Judgment in *Merck & Co.* v. *Staats*, *supra*, at 16. Even in cases of non-cost-based contracts where negotiations over price did not occur, GAO's examination of the contractor's cost records could well "lead to the use of other methods of meeting future procurement needs" (*Hewlett-Packard Co.* v. *United States*, *supra*, 385 F. 2d at 1016). And, as the court stated in refuting the same argument in *Eli Lilly* (574 F. 2d at 913, 914-915):

> In interpreting the statutory language, as the Comptroller General contends, "it is hard to imagine anything more directly related to a contract than the cost of producing the items covered by it or the matters going into the makeup of the price" * * *.
>
> * * * * *
>
> [Petitioner's] argument * * * limit[s] "directly pertinent" to an inquiry into what issues were negotiated at the time of contracting * * *. This interpretation apparently is based on the assumption that if the Government did not negotiate about an issue, it thereby considered it not to be pertinent. Such an interpretation might be reasonable if the statutory standard were that the information must be "directly

> pertinent" to the negotiation, but the standard is "directly pertinent" to the contract and plaintiff offers no reason to suppose that there would be a reason to negotiate about each item that might have a significant effect on the seller's cost or performance. * * *
>
> In the final analysis, [petitioner's] suggested interpretation of examining what was negotiated rests on its conclusion that Sections 2313 and 254 were designed only to uncover "improprieties in the negotiation of Government contracts" * * *. However, * * * controlling fraud was not the only purpose of the legislation and * * * another concern of the legislators was with excessive pricing. Given this latter purpose and our view of the meaning of "directly pertinent," the access-to-records clauses should be interpreted so that an item is "directly pertinent" to a contract if it is a significant input in the cost of the product purchased in the contract.

3. Apart from the lack of merit to its substantive arguments, petitioner has failed to demonstrate that the instant case warrants the extraordinary course of review by this Court before judgment in the court of appeals. Petitioner does not contend that the issues it seeks to raise are "of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 18. Compare, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Petitioner does assert, however, that considerations of sound judicial administration militate in favor of certiorari before judgment in this case. We disagree.

In essence, petitioner seeks to present two questions that have not divided the courts of appeals and are not

otherwise appropriate for this Court's review. Indeed, the Court has already declined to hear these very questions in the absence of such a conflict. See *Eli Lilly & Co.* v. *Staats*, cert. denied, 439 U.S. 959 (1978). Petitioner has suggested no reason for a different disposition of this case even after decision by the court of appeals, and certainly none that would provide sufficient grounds for circumventing that court by means of certiorari before judgment.

Prudent judicial administration does not counsel a contrary result. Notwithstanding petitioner's apprehensions, it is a distinct possibility, especially in light of *Eli Lilly*, that the Court will never need to confront the two issues raised here. On the other hand, if a conflict does develop, there will be time enough then to petition for certiorari at a point when this Court would have the benefit of full ~~exploitation~~ explication of the courts of appeals' divergent views.[13] Moreover, insofar as petitioner wishes to be heard on the question presented in *Bristol*—as to which there *is* currently a conflict in the circuits—it can be fully accommodated through the opportunity to appear as an *amicus curiae*. In sum, to grant the instant petition for certiorari before judgment, or to deny the petition in *Bristol* with the expectation of subsequently granting certiorari in *SmithKline* or *Merck* after final judgment in the court of appeals, would needlessly involve the Court in the resolution of issues that plainly do not warrant review and is unnecessary to protect petitioner's legitimate interests.

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[13]We note that petitioner has urged the court of appeals, as one disposition of the case, to vacate the judgment of the district court and remand for further factual proceedings on the question of GAO's purpose in requesting access to petitioner's records (SmithKline Br. 29-34; see also Pet. App. 10a). Thus, even after the court of appeals has rendered a decision, it is possible that the case would be interlocutory in nature and therefore unsuited to review in this Court.

Petitioner is not aided in any way by the cases it cites regarding certiorari before judgment (Pet. 16-17). None of those cases concerned an attempt, as here, to interject new and separate issues into a pending proceeding. Rather, in each of the cited instances, the issues raised in the respective cases were substantially identical. Moreover, on each occasion, the decisions under review either involved the same court of appeals, so that the circuit had already passed upon the legal question presented in the petition for certiorari before judgment,[14] or pertained to a single dispute and presented potentially inconsistent legal obligations that could not be jointly fulfilled by the parties.[15] No comparable circumstances are presented in this case, and the exceptional procedure for certiorari before judgment is inappropriate here.[16]

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[14]See *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946), and *Porter* v. *Lee*, 328 U.S. 246, 251 n.3 (1946); *Johnson* v. *Fleet Corp.*, 280 U.S. 320, 322-325 (1930). See also *Taylor* v. *McElroy*, 360 U.S. 709, 709-710 (1959), and *Greene* v. *McElroy*, 360 U.S. 474 (1959).

[15]See *New Haven Inclusion Cases*, 399 U.S. 392, 414, 418 (1970); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 (1963). See also *Washington* v. *Fishing Vessel Assn.*, 443 U.S. 658, 671-674 (1979); *Hannah* v. *Larche*, 363 U.S. 420, 422-423 & n.3, 428-430 (1960).

[16]An analogous situation would exist here if, for example, petitioner had filed suit in one district court to enjoin GAO's request and the government had brought an action in another district court to enforce the request; in the event the Court granted certiorari in one of these cases after judgment in the court of appeals, it might not be inappropriate (although it would hardly be necessary) to grant certiorari before judgment in the other case if the litigated issues were substantially identical and if either the two cases arose in the same circuit or divergent decisions would impose incompatible legal duties on the parties. In contrast, the instant petition does not implicate these considerations in support of certiorari before judgment.

CONCLUSION

The conditional petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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NOVEMBER 1980

DOJ-1980-11